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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELEAZAR MARDOQUEO AGUILAR,

Defendant and Appellant.

B283271

(Los Angeles County
Super. Ct. No. VA141939)

APPEAL from an order of the Superior Court of Los Angeles County, Joseph R. Porras, Judge. Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Eleazar Mardoqueo Aguilar appeals from the trial court's denial of his motion to vacate his no contest plea, made pursuant to Penal Code section 1473.7.¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

1. *The offenses*

In May 2016, Aguilar lived with his wife of 20 years, J. and their son, V. On May 13, 2016, Aguilar observed a towel out of place in the family's bathroom. He became angry, an argument with J. ensued, and Aguilar punched J. in the face. When V. intervened, Aguilar pushed V. into a closet door, knocking V. to the floor and causing the door to come off its rail. V. got up and again attempted to restrain Aguilar, causing both Aguilar and V. to fall. Aguilar used his body weight to pin both victims to the floor. Aguilar then choked J. with one hand and V. with the other, until J.'s father came into the room and defused the situation. Deputies who responded to the scene observed swelling under J.'s eye, redness on her chest and neck area, and scratches on her arms.

In a two-count felony complaint filed on May 17, 2016, the People charged Aguilar with injuring a spouse or child's parent (§ 273.5, subd. (a)) and child abuse (§ 273a, subd. (a)).

¹ All further undesignated statutory references are to the Penal Code.

² Because Aguilar pled no contest prior to trial, we derive the facts from the probation report.

2. Aguilar's plea and sentence

On May 31, 2016, prior to the preliminary hearing, Aguilar pled no contest to inflicting corporal injury upon a spouse (§ 273.5, subd. (a)) and misdemeanor child abuse (§ 273a, subd. (a)), in exchange for a grant of probation with a 365-day jail term. Prior to entering his plea, Aguilar initialed and signed a “Felony Advisement of Rights, Waiver, and Plea Form” (hereinafter “Plea Form”). Among the paragraphs he initialed were numbers 12 and 14. Paragraph 12 stated: “**Immigration Consequences**—I understand that if I am not a citizen of the United States, I must expect my plea of guilty or no contest will result in my deportation, exclusion from admission or reentry to the United States, and denial of naturalization and amnesty.” Paragraph 14 stated: “Prior to entering this plea, I have had a full opportunity to discuss with my attorney the facts of my case, the elements of the charged offense(s) and enhancement(s), any defenses that I may have, my constitutional rights and waiver of those rights, and the consequences of my plea.”

Text just above the Plea Form’s signature line read: “I have read and initialed each of the paragraphs above and discussed them with my attorney. My initials mean that I have read, understand and agree with what is stated in the paragraph. The nature of the charges and possible defenses to them, and the effect of any special allegations and enhancements have been explained to me. I understand each and every one of the rights outlined above and I hereby waive and give up each of them in order to enter my plea to the above charges.”

The Plea Form also bore the signature of Aguilar’s plea counsel, Adam M. Sexton. The “Attorney Statement” preceding Sexton’s signature stated, in pertinent part: “I have reviewed

this form with my client. I have explained each of the defendant's rights to the defendant and answered all of his or her questions with regard to those rights and this plea. I have also discussed the facts of the case with the defendant, and explained the nature and elements of each charge, any possible defenses to the charges, the effect of any special allegations and enhancements, and the consequences of the plea."

At the plea hearing, Aguilar orally affirmed that he had gone over the Plea Form with his attorney, initialed, signed, and dated it, and had no questions regarding it. The prosecutor orally advised Aguilar of his constitutional rights and the consequences of his plea, including: "There are certain immigrational consequences to your plea today. [¶] If you're not a citizen of the United States, your plea could cause you to be deported, excluded, denied reentry, amnesty, and naturalization." Aguilar affirmed that he "underst[ood] all the consequences[.]"

Aguilar then pled no contest as discussed *ante*. He indicated he entered the plea because he believed it was in his best interest to do so. Attorney Sexton joined in the waivers, concurred in the plea, and stipulated to a factual basis based upon the police report and the complaint. The trial court found there was a factual basis for the plea, Aguilar's waiver of his rights was knowing and intelligent, and the plea was made "with an understanding of the nature and the consequences thereof"

Aguilar was sentenced on June 20, 2016. The trial court suspended imposition of sentence and placed Aguilar on formal probation for three years,³ on condition he serve 365 days in jail.

³ At the plea hearing, the prosecutor stated that the negotiated disposition was for a five-year probationary period,

3. Motion to withdraw or vacate the plea pursuant to section 1473.7

Immigration officials detained Aguilar on November 3, 2016, when he completed his county jail sentence. A “Notice to Appear” issued by the United States Department of Homeland Security informed Aguilar that he was subject to removal by virtue of his offenses. Both crimes had immigration consequences, but in particular the domestic violence conviction was an aggravated felony under federal law because the term of incarceration was one year.

In April 2017,⁴ Aguilar moved in the trial court to withdraw or vacate his plea pursuant to section 1473.7, on the ground his plea attorney, Sexton, provided ineffective assistance by failing to advise him of the immigration consequences of his plea, failing to adequately investigate the consequences of the plea, and failing to attempt to negotiate an immigration-neutral disposition.

In a declaration offered in support of the motion, Aguilar stated the following. He met his plea counsel, Sexton, for the first time on the date of the plea.⁵ Sexton stated that the “best deal” he could obtain on Aguilar’s behalf was “a one year sentence with half, meaning [Aguilar] would only serve half the sentence.”

not the three-year term the trial court imposed. The reason for the discrepancy between the eventual sentence and the prosecutor’s statements is not revealed in the record.

⁴ Aguilar initially filed a motion to withdraw or vacate the plea on March 21, 2017. That motion was taken off calendar when no one appeared on the noticed hearing date, and Aguilar filed a second motion on April 18, 2017.

⁵ A different attorney represented Aguilar at arraignment.

During the conversation, Sexton asked Aguilar if he was a United States citizen. Aguilar stated he was a legal permanent resident, not a citizen, and asked how the plea would affect his immigration status. Sexton answered that he did not practice immigration law and did not know. Sexton then queried whether Aguilar wanted to “‘sign today’ ” or think about the offer and return later. Sexton also stated that Aguilar was facing five years and “ ‘this is the best deal and it is not going to get any better.’ ” Sexton did not inform Aguilar of “other options” and did not state he would seek a 364-day sentence. “[C]onfused and under immense pressure” based on Sexton’s statements, Aguilar felt that if he refused the deal, “it was going to get worse.” Therefore, he “reluctantly decided to take the deal.” Thereafter, Sexton provided him with the Plea Form, and told him to read it and initial the boxes. Sexton did not go over the Plea Form “item by item” with Aguilar.

According to Aguilar’s declaration, he “first learned that [he] was going to have immigration problems as a result of [his] plea” when immigration officials detained him on November 3, 2016. When he executed the undated declaration offered in support of the section 1473.7 motion, he was in immigration custody without bail. He averred that, had he “been properly advised” by Sexton that he “would be facing deportation, exclusion from admission, or denial of naturalization from the United States,” he “would have taken greater risks and would not have pled no-contest. [He] would have attempted to obtain an acquittal, a dismissal, a different sentence, or, a conviction under another charge that would not have adverse immigration

consequences.”⁶ Aguilar did not offer Sexton’s declaration in support of the motion.

At the hearing on the motion, Aguilar’s motion counsel⁷ acknowledged that the trial court had properly advised Aguilar about the immigration consequences of the plea. He also clarified that he was “not arguing that [Aguilar] would not have pled guilty.” Nonetheless, he urged, plea counsel should have fully investigated the immigration laws, should have laid out Aguilar’s options more clearly, and should have worked harder to negotiate a disposition with less draconian immigration consequences. In particular, counsel should have negotiated a sentence of less than 365 days, in that the 365-day term caused the domestic violence offense to be an aggravated felony for purposes of federal immigration law.

The People opposed the motion, arguing, *inter alia*, that Aguilar failed to meet his burden to prove ineffective assistance because he had not submitted a declaration from Sexton corroborating his assertions. At the hearing, the deputy district

⁶ Also attached in support of the section 1473.7 motion were, *inter alia*, letters from coworkers and family members (including the victims), attesting to Aguilar’s character as a dependable, hard worker and a loving family man; documents showing that Aguilar’s wife and son are United States citizens and that Aguilar is a member of the Ironworkers Union; and documents showing eviction proceedings were instituted against the family in December 2016.

⁷ We use the nomenclature “motion counsel” and “plea counsel” to differentiate between the attorney who represented Aguilar in regard to his section 1473.7 motion, and the attorney who represented him during the plea proceedings, respectively.

attorney also argued that there was no showing plea counsel could have negotiated a more favorable disposition, because the People “rarely offer[ed] probation, period, on domestic violence cases, let alone 364 [days] solely to circumvent federal law,” a circumstance that would have been familiar to plea counsel given his long tenure as a public defender.

Aguilar did not call Sexton as a witness at the hearing on the motion, and Sexton did not personally appear.⁸

On May 17, 2017, the trial court denied the motion. Examining the totality of the circumstances, it found Sexton’s performance did not fall below an objectively reasonable standard of competence. Aguilar had been advised of the immigration consequences of his plea both orally and in writing; had acknowledged that he understood those advisements; and had stated in court that he had gone over the Plea Form with Sexton. Thus, “all the indications are [Aguilar] knew that this was going to have immigration consequences.” Therefore, the court reasoned, there was little else plea counsel could have done. Moreover, there was no showing plea counsel could have obtained a more favorable result. The trial court observed that typically, an early disposition program offer is extended before the preliminary hearing transpires, but is “off the table” once the preliminary hearing is complete. Had plea counsel advised Aguilar to wait, this approach could have resulted in a longer

⁸ In their brief below, the People averred that should the trial court find Aguilar’s “self-serving declaration” satisfied his initial burden, the People would call Sexton in rebuttal, in that Aguilar had waived the attorney-client privilege. Apparently in anticipation of that eventuality, a public defender representing Sexton appeared at the hearing.

sentence, which would have resulted in the same immigration consequences.

Aguilar sought, and was granted, a certificate of probable cause. He timely appealed the trial court's denial of his section 1473.7 motion.

DISCUSSION

The trial court properly denied the section 1473.7 motion

Aguilar contends the trial court erred by denying his section 1473.7 motion. He urges that he made a sufficient showing his plea counsel's performance was deficient, in that (1) plea counsel failed to advise him that he would be deported as a result of the plea, and (2) had he known he would be deported, he would have insisted on going to trial. In supplemental briefing, Aguilar contends that, under *People v. Camacho* (2019) 32 Cal.App.5th 998 (*Camacho*), the trial court could have granted his motion even if he failed to prove ineffective assistance of counsel, and the matter should be remanded to allow the trial court to make such a determination. We conclude the trial court's ruling was correct and remand is unwarranted.

1. *Section 1473.7*

Section 1473.7, which took effect in January 2017, allows a person who is no longer in criminal custody to move to vacate a conviction or sentence entered on a plea, based on ineffective assistance of counsel giving rise to unexpected immigration consequences, or on other errors affecting the defendant's ability to understand or accept the adverse immigration consequences of a plea. (*Camacho, supra*, 32 Cal.App.5th at pp. 1005–1007; *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116; *People v. Tapia* (2018) 26 Cal.App.5th 942, 949.) As relevant here, section 1473.7, subdivision (a)(1), authorizes a “person who is no longer

in criminal custody” to move to vacate a conviction or sentence, where the conviction or sentence is “legally invalid due to prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.” (§ 1473.7, subd. (a); *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75.)

Thus, “[i]neffective assistance of counsel that damages a defendant’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea, if established by a preponderance of the evidence, is the type of error that entitles the defendant to relief under section 1473.7.” (*People v. Ogunmowo, supra*, 23 Cal.App.5th at p. 75; *People v. Espinoza* (2018) 27 Cal.App.5th 908, 914.) But, a showing of ineffective assistance is not required. Section 1473.7 was amended, effective January 1, 2019, to clarify that a “finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.” (§ 1473.7, subd. (a)(1); *Camacho, supra*, 32 Cal.App.5th at p. 1006.) The moving party has the burden to establish by a preponderance of the evidence any of the grounds for relief specified in subdivision (a). (*People v. Tapia, supra*, 26 Cal.App.5th at p. 949; *People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 220.) If the moving party makes this showing, the trial court “shall grant the motion to vacate the conviction or sentence.” (§ 1473.7, subd. (e)(1).)

As relevant here, section 1473.7 thus contains three requirements: (1) the moving party can no longer be in criminal custody; (2) there must be prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or

knowingly accept the actual or potential adverse immigration consequences of a plea; and (3) the motion must be timely, that is, filed with reasonable diligence. (*People v. Perez* (2018) 19 Cal.App.5th 818, 826.)

We review the trial court's ruling under the standard applicable to mixed questions of law and fact. That is, we defer to the trial court's factual determinations if supported by substantial evidence, but exercise our independent judgment when deciding whether the facts demonstrate deficient performance and resulting prejudice. (*People v. Ogunmowo, supra*, 23 Cal.App.5th at p. 76; *People v. Olvera, supra*, 24 Cal.App.5th at p. 1116; *People v. Tapia, supra*, 26 Cal.App.5th at p. 950.)

2. Application here

a. Aguilar has failed to show he was no longer in criminal custody when he made the section 1473.7 motion

Aguilar has failed to establish the first two elements necessary to establish relief under section 1473.7.⁹ First, Aguilar has not shown he was free of criminal custody when he brought the section 1473.7 motion.¹⁰ Aguilar was sentenced on June 20, 2016 to jail time and three years of probation. His motion was filed on April 20, 2017. Therefore, when he filed the motion, he was still on probation.

It has long been held that an individual is in constructive state criminal custody when he or she is on probation. (*People v.*

⁹ There is no dispute that Aguilar met the third requirement, that his motion was timely.

¹⁰ Although the trial court's denial was not based on this reasoning, we review the court's ruling, not its rationale. (*People*

Johnson (1993) 20 Cal.App.4th 106, 110 [“ ‘During the period of his probation, the probationer remains in the constructive custody of the court and is bound by the terms and conditions of the court’s probation order’”].) For example, in *People v. Villa* (2009) 45 Cal.4th 1063, our Supreme Court addressed the converse situation to that here, concluding that a writ of habeas corpus was unavailable to a defendant who was no longer in state criminal custody, even though he was in federal immigration custody. (*Id.* at p. 1066.) California’s habeas corpus statute provides that the writ is available to a person “unlawfully imprisoned or restrained of his or her liberty.” (§ 1473, subd. (a); *People v. Villa*, at p. 1068.) Thus, a “necessary prerequisite for issuance of the writ is the custody or restraint of the petitioner by the government.” (*People v. Villa*, at p. 1068.) *Villa* explained: “In previous eras, the custody requirement was interpreted strictly to mean actual physical detention. [Citations.] This view has since been somewhat relaxed. Thus, ‘the decisional law of recent years has expanded the writ’s application to persons who are determined to be in constructive custody. Today, the writ is available to one on parole [citation], probation [citation], bail [citation], or a sentenced prisoner released on his own recognizance pending hearing on the merits of his petition [citation].’ [Citation.]” (*Id.* at p. 1069.) “Under all of these scenarios, the habeas corpus petitioner is deemed to be in constructive custody because he or she ‘is subject to “restraints not shared by the public generally” ’ [citations] and ‘may later lose his liberty and be eventually incarcerated’ [citation].” (*Id.* at

v. Zamudio (2008) 43 Cal.4th 327, 351, fn. 11; *People v. Perez*, *supra*, 19 Cal.App.5th at p. 829.)

p. 1070; see *People v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1149 [“once a defendant has been released and is no longer subject to parole or probation, he or she is no longer in constructive custody”]; cf. *In re Palmer* (2019) 33 Cal.App.5th 1199, 1203 [“parolees remain in constructive state custody and are subject to constraints on their liberty”].)

Accordingly, a “convicted felon currently on formal probation, is not a person entitled to the relief covered in section 1473.7.” (*People v. Cruz-Lopez, supra*, 27 Cal.App.5th at pp. 224.) “Section 1473.7 is not applicable to a person under probation at the time the motion is presented.” (*Id.* at p. 221.) As *People v. Cruz-Lopez* explained, generally a petition for writ of habeas corpus or a motion pursuant to section 1016.5 are the means available to an in-custody defendant who wishes to withdraw a plea because he or she was not advised of a plea’s immigration consequences. (*Id.* at p. 220.) Section 1473.7 applies when these “more traditional collateral relief measures are not available.” (*People v. Cruz-Lopez*, at p. 220.) A person who is currently on probation “is in constructive custody—he is under restraint. [Citation.] Actual physical custody is no longer required.” (*People v. Cruz-Lopez*, at p. 221.) Like the defendant in *Cruz-Lopez*, Aguilar was not free of criminal custody because he was on probation when he brought his motion.

Aguilar argues that, because he was no longer in jail when he brought the motion to vacate, he was no longer in criminal custody. In support, he points to the 2018 amendments to section 1473.7, effectuated by Assembly Bill No. 2867. As originally enacted, section 1473.7 provided: “A person *no longer imprisoned or restrained* may prosecute a motion to vacate” his or her conviction or sentence. (Stats. 2016, ch. 739, § 1, italics added.)

Effective January 1, 2019, the Legislature amended the italicized language to read: “A person *who is no longer in criminal custody* may file a motion to vacate” a conviction or sentence. (Stats. 2018, ch. 825, § 2, italics added.) Aguilar argues that common sense requires the conclusion that “criminal custody” means incarcerated.

Also, as originally enacted, the statute provided that a section 1473.7, subdivision (a)(1) motion had to be filed with reasonable diligence after the moving party’s receipt of a notice to appear in immigration court or a notice asserting that the conviction or sentence provided a basis for removal, or after the date a removal order became final, whichever was later. (Stats. 2016, ch. 739, § 1; former § 1473.7, subds. (b)(1) & (2).) Assembly Bill No. 2867 amended subdivision (b) of the statute to state: “Except as provided in paragraph (2), a motion pursuant to paragraph (1) of subdivision (a) shall be deemed timely filed at any time in which the individual filing the motion is no longer in criminal custody.” As amended, subdivision (b), paragraph (2) provides that a motion may be deemed untimely if not filed with reasonable diligence after receipt of the aforementioned notices and order, as well as a notice of the denial of an application for an immigration benefit, lawful status, or naturalization. (§ 1473.7, subd. (b); Stats. 2018, ch. 825, § 2.) Aguilar argues that because a motion may be deemed untimely if not filed after the receipt of such immigration notices, the “Legislature must have meant for persons receiving such notice to be able to file for reprieve as soon as they are released from criminal custody and placed in immigration proceedings.”

In any case involving statutory interpretation, our fundamental task is to determine the Legislature’s intent, so as

to effectuate the law’s purpose. We begin with an examination of the statute’s words, giving them a plain and commonsense meaning. (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141; *People v. Colbert* (2019) 6 Cal.5th 596, 603.) The flaw in Aguilar’s argument is that the 2018 amendments retained the “criminal custody” language, even adding it again in amended subdivision (b)(1) of section 1473.7. As explained, it has long been held that a person on probation is in constructive custody. In enacting and amending section 1473.7, the Legislature did nothing to indicate “custody” was intended to have a different or unique meaning for purposes of the statute. “It is a settled principle of statutory construction that the Legislature ‘ “is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. [Citations.]” ’ ” (*People v. Scott* (2014) 58 Cal.4th 1415, 1424; *People v. Martinez* (1995) 11 Cal.4th 434, 445–446 [where statutory language has been judicially construed, if the Legislature amends the statute but leaves such language intact, is it deemed to be aware of and accept the prior construction]; *People v. Modiri* (2006) 39 Cal.4th 481, 499.) Here, when the Legislature amended section 1473.7’s language, it did not omit or alter the term “custody.”

To the extent the statute could be found to contain any ambiguity, review of the legislative history gives no indication that the Legislature intended to constrict the definition of “custody” for purposes of section 1473.7. A report prepared for the Senate Committee on Public Safety included the bill’s author’s explanation that, prior to enactment of the statute in 2016, a person who was no longer in custody had no means to seek vacation of a conviction or sentence on the ground that a prejudicial error had damaged his or her ability to understand or

accept the immigration consequences of a plea. (Sen. Com. on Pub. Safety, Rep. on Assem. Bill No. 2867 (2017–2018 Reg Sess.) as amended June 4, 2018, pp. 4–5.) A petition for writ of habeas corpus was the usual vehicle to bring such a challenge, the author explained, but to be eligible for habeas relief, a petitioner had to be unlawfully imprisoned or restrained. “Actual incarceration in prison or jail is not required for a petition for writ of habeas corpus; persons on bail, probation, parole, or committed to a state hospital are considered to be in constructive custody” (*Id.* at p. 5.) Federal immigration custody alone, however, did not qualify as custody for purposes of habeas review, and section 1473.7 “remedied that limitation by creating a procedure” allowing persons in immigration custody to seek relief. (Sen Com. on Pub. Safety, Rep. on Assem. Bill No. 2867, at p. 5.) In other words, the Legislature was aware, when it enacted and amended the statute, that persons on probation were “in custody.”

Likewise, the Legislature’s uncoded statement of findings and declarations accompanying the 2018 amendments states that the purpose of the original statute was to “provide people *no longer in criminal custody*, or after the specified period in which to move for withdrawal of a plea has elapsed, with the opportunity to raise a claim of legal invalidity” (Stats. 2018, ch. 825, § 1, subd. (a), italics added.) The Legislature intended, by amending the law, to ensure “that courts have the authority to rule on motions filed pursuant to Section 1473.7 of the Penal Code, *provided that the individual is no longer in criminal custody.*” (Stats. 2018, ch. 825, § 1, subd. (e), italics added.) In sum, neither the statutory language nor the legislative history

indicate an intent to exclude probation from the definition of custody.

b. Aguilar has failed to establish he is entitled to relief under section 1473.7

(i) *Aguilar has failed to show ineffective assistance*

In any event, even assuming arguendo that Aguilar was not in custody, he has failed to establish the second prong of his section 1473.7 claim, i.e., ineffective assistance of counsel or other error damaging his ability to understand, defend against, or accept the immigration consequences of his plea. Aguilar's section 1473.7 motion, filed in 2017, was brought on the ground that trial counsel provided ineffective assistance by (1) failing to advise him of the immigration consequences of the plea, and (2) failing to defend against the immigration consequences of the plea. We therefore address his contention of ineffective assistance before considering whether he has shown any other error entitling him to relief.

"To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance." (*People v. Ogunmowo, supra*, 23 Cal.App.5th at p. 75; *Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 691–692; *People v. Olvera, supra*, 24 Cal.App.5th at pp. 1116–1117.) "[W]hen a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial." ' [Citation.]" (*People v. Ogunmowo*, at p. 78.)

The failure to give proper immigration advisements may constitute ineffective assistance. “Since 2001, it has been settled in California that ineffective assistance claims may be viable despite the collateral nature of immigration consequences and despite statutory warnings that the plea ‘may’ have such consequences.’” (*People v. Olvera*, *supra*, 24 Cal.App.5th at p. 1116.) And, in *Padilla v. Kentucky* (2010) 559 U.S. 356, the United States Supreme Court held that the Sixth Amendment guarantee of the effective assistance of counsel requires an attorney to advise a client of the potential deportation consequences of the plea. (*Id.* at pp. 360, 366; *People v. Tapia*, *supra*, 26 Cal.App.5th at p. 951.) When the “deportation consequence [of a plea] is truly clear . . . the duty to give correct advice is equally clear.” (*Padilla v. Kentucky*, at p. 369.)

A noncitizen convicted on an offense denominated an “aggravated felony” under the federal Immigration and Nationality Act is subject to mandatory deportation. (*Lee v. United States* (2017) 137 S.Ct. 1958, 1963; *Sessions v. Dimaya* (2018) 138 S.Ct. 1204, 1210; *Camacho*, *supra*, 32 Cal.App.5th at p. 1005; *People v. Tapia*, *supra*, 26 Cal.App.5th at p. 951.) “Such an alien is also ineligible for cancellation of removal, a form of discretionary relief allowing some deportable aliens to remain in the country. [Citation.] Accordingly, removal is a virtual certainty for an alien found to have an aggravated felony conviction, no matter how long he has previously resided here.” (*Sessions v. Dimaya*, at pp. 1210–1211.) A crime of violence, for which the term of imprisonment is at least one year, qualifies as an aggravated felony. (*Id.* at p. 1211.) The parties do not dispute that, under federal immigration law, and by virtue of the one-year jail sentence, Aguilar’s conviction for violation of section

273.5 is an aggravated felony. (See *Carillo v. Holder* (9th Cir. 2015) 781 F.3d 1155, 1157, 1158; 8 U.S.C. 1227(a)(2)(E)(i).)

Aguilar’s ineffective assistance claim nonetheless fails because the trial court concluded Aguilar was aware of the immigration consequences of his plea, and substantial evidence supports that conclusion. “To be successful in a motion withdrawing a guilty plea due to improper immigration advisement[s], an accused must demonstrate he was ignorant of these consequences when he entered his plea.” (*People v. Cruz-Lopez, supra*, 27 Cal.App.5th at p. 222.) Here, the trial court observed that Aguilar acknowledged initialing and signing the Plea Form. The Plea Form stated that Aguilar “must expect my plea of guilty or no contest will result in my deportation, exclusion from admission or reentry to the United States, and denial of naturalization and amnesty.” Aguilar stated in open court that he had gone over the form with his attorney, and had no questions regarding it. Thus, the trial court reasoned, “In this case . . . all the indications are he knew that this was going to have immigration consequences.”

People v. Olvera is instructive. There, the defendant signed a plea advisement form with “boilerplate language” stating that his plea would, “‘now or later,’” result in deportation, exclusion, and denial of naturalization. (*People v. Olvera, supra*, 24 Cal.App.5th at pp. 1114–1115.) He also acknowledged at the plea hearing that his attorney had gone over the form with him. (*Id.* at p. 1115.) The appellate court upheld the denial of Olvera’s section 1473.7 motion, reasoning that the plea advisement sufficed to satisfy counsel’s affirmative duty to alert defendant about immigration consequences: “The admonition was boilerplate, but it was unequivocal and accurate.” (*People v.*

Olvera, at p. 1117; see *People v. Perez*, *supra*, 19 Cal.App.5th at pp. 829–830 [defendant was informed by plea form and by the trial court’s oral advisement that he would be deported if he pled guilty; his declaration in support of his section 1473.7 motion, stating he had not understood he would be deported and that counsel failed to explain immigration consequences of his plea, was unsupported by the unambiguous record].)

The same is true here. The only evidence contemporaneous with Aguilar’s plea shows he was expressly advised in writing that he should expect his plea would result in deportation; he acknowledged he understood the form and had gone over it with plea counsel; and the prosecutor reiterated that if he was not a citizen, his plea could cause him to be deported. Because the evidence showed counsel went over the Plea Form with Aguilar, Aguilar has failed to establish that counsel failed to provide him with the proper immigration advice. Because the trial court found Aguilar did, in fact, know that the plea would result in his deportation, he cannot show that he would not have pled had he been advised of such a consequence.

Aguilar argues that because the statements in his declaration were unrebutted, the trial court was obliged to accept them at face value. Not so. The statements in Aguilar’s declaration—that plea counsel did not advise him of the immigration consequences of the plea, did not go over the Plea Form “item by item” with him, and that he would not have pled had he been properly advised—were rebutted by the contrary evidence in the record, i.e., the Plea Form signed by both Aguilar and plea counsel, and Aguilar’s oral acknowledgments at the plea hearing. Because the trial court’s finding that Aguilar was indeed aware of the immigration consequences of his plea is

supported by substantial evidence, we defer to that finding. (*People v. Tapia*, *supra*, 26 Cal.App.5th at pp. 951–953 [substantial evidence supported finding defendant was advised of immigration consequences, where trial court did not credit defendant’s self-serving claim to the contrary in light of other evidence in the record].) “Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences.” (*Lee v. United States*, *supra*, 137 S.Ct. at p. 1967; *People v. Ogunmowo*, *supra*, 23 Cal.App.5th at p. 78.)

Nor are we persuaded by Aguilar’s argument that counsel had a “heightened” duty to research immigration consequences after Aguilar purportedly inquired about them.¹¹ Aguilar was advised by the Plea Form that he should expect his plea would result in deportation, exclusion from admission or reentry to the United States, and denial of naturalization and amnesty. Aguilar asserts he is facing deportation as a result of his plea; he does not identify some other immigration-related consequence about which he should have been advised. It is therefore unclear how counsel’s failure to conduct additional research was somehow unreasonable.¹²

¹¹ In support of this contention, Aguilar cites *People v. Landaverde* (2018) 20 Cal.App.5th 287. However, after Aguilar filed his opening brief, *Landaverde* was depublished, and is no longer citable authority. (*People v. Landaverde* (May 16, 2018, S247481).

¹² Below, Aguilar argued his counsel provided ineffective assistance by failing to negotiate an immigration-neutral

(ii) *Aguilar has failed to show other prejudicial error*

As noted, in 2018 the Legislature amended section 1473.7 to provide that, while a finding of legal invalidity under section 1473.7 *may* be based upon ineffective assistance of counsel, such a finding is not *required*. (Stats. 2018, ch. 825, § 2; *Camacho*, *supra*, 32 Cal.App.5th at pp. 1006.) *Camacho* reasoned that the amendment to section 1473.7, which merely clarified the statute’s original intent, applies to section 1473.7 motions brought prior to the amendment. The court explained that an amendment that construes and clarifies a statute is not technically retrospective, because it is not considered a change in the law. (*Camacho*, at p. 1007; *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243–244.)

In supplemental briefing, Aguilar argues that because the trial court believed it could not grant the motion unless it found the ineffective assistance claim meritorious, the matter must be remanded to allow the court to revisit the motion “using the correct legal standards,” i.e., the amended version of section 1473.7.

The problem with Aguilar’s argument is that the trial court not only rejected the ineffective assistance claim; it also made a factual finding that Aguilar knew the plea would have immigration consequences. Aguilar’s motion was premised on the theory that, had he known he would be deported as a result of the plea, he would have insisted on going to trial. To obtain relief under section 1473.7, subdivision (a)(1), Aguilar had to show his

disposition. He does not renew this argument on appeal, and we therefore do not address it.

conviction or sentence was “legally invalid due to prejudicial error damaging [his] ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of” his plea. (§ 1473.7, subd. (a)(1).) Given the trial court’s finding that Aguilar was aware of the consequences of the plea—which, as we have discussed, was supported by substantial evidence—Aguilar fails to show any prejudicial error that damaged his ability to meaningfully understand or knowingly accept the immigration consequences of his plea. Thus, regardless of its ruling on the ineffective assistance claim, the trial court’s finding was also fatal to any claim that some error apart from ineffective assistance rendered the conviction or sentence legally invalid. Nor has Aguilar shown any error that prevented him from meaningfully defending against the immigration charges. Accordingly, remand is not warranted.

DISPOSITION

The trial court's order denying Aguilar's section 1473.7 motion is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL
REPORTS**

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.